

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of New) NOTICE OF ADOPTION AND
Rule I and the amendment of ARM) AMENDMENT
37.10.101, 37.10.104, and 37.10.105)
pertaining to living wills)

TO: All Concerned Persons

1. On August 14, 2008, the Department of Public Health and Human Services published MAR Notice No. 37-450 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 1686 of the 2008 Montana Administrative Register, Issue Number 15.

2. The department has amended ARM 37.10.101 and 37.10.105 as proposed.

3. The department has adopted and amended the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

RULE I (37.10.108) DO-NOT-RESUSCITATE PROTOCOL (1) POLST is intended to replace Comfort One as the system used by medical professionals to identify and administer appropriate care, including DNR orders, to terminally ill patients.

(2) When issuing a DNR order for a patient with a terminal condition, medical professionals are encouraged to ~~must~~ use the POLST form and follow the DNR/POLST protocol approved by the Board of Medical Examiners and the department. The department adopts and incorporates the DNR/POLST protocol July, 2008 which can be found at www.mt.gov/dli/bsd/license/bsd_boards/med_board/licenses/med/polst.asp or upon request from the Montana Board of Medical Examiners, P.O. Box 200513, 301 S. Park, 4th Floor, Helena, MT 59620.

(3) All previously issued Comfort One identifying material, including forms, will be considered valid by health care providers.

~~(4) All previously issued DNR orders will be considered valid by health care providers.~~

AUTH: 50-10-105, MCA

IMP: 50-10-101, MCA

37.10.104 LIVING WILL PROTOCOL FOR EMS PERSONNEL (1) The living will protocol may also be designated the "POLST protocol". Providers may use POLST to implement DNR orders, or the end of life treatment decisions by a patient expressed through a living will or otherwise.

(2) For a patient who has completed a POLST or Comfort One form, emergency medical services personnel must follow the POLST protocol for providing palliative care or withholding life-sustaining procedures from a patient if a patient meets the following criteria:

(a) The identity of the patient has been clearly established and the personnel have been presented with any one of the following:

- (i) a POLST form for the patient;
- (ii) a Comfort One card or form for the patient; or
- (iii) a written DNR order signed and dated by a physician provider.

(b) An unresponsive person is wearing a Comfort One necklace or bracelet ~~identifying the existence of a DNR order~~ (no further identification is necessary).

AUTH: 50-9-110, MCA

IMP: 50-9-102, 50-9-103, MCA

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: The rules appear to limit POLST to patients with a terminal illness. They do not believe that is consistent with the intent of POLST and believe that a broader definition should be adopted to include individuals not having a terminal condition.

RESPONSE #1: The department disagrees. While POLST is based on a national program, the POLST form, protocol, and rules were developed in conjunction with the Board of Medical Examiners in an attempt to develop a living will protocol for Montana, and must be consistent with Montana law. These rules were adopted pursuant to the department's authority in the Montana Rights of the Terminally Ill Act to adopt a living will protocol, which is defined in statute as follows:

"Living will protocol" means a locally developed, communitywide method or a standardized, statewide method developed by the department and approved by the board, of providing palliative care to and withholding life-sustaining treatment from a qualified patient under 50-9-202 by emergency medical service personnel."

50-9-102(10), MCA. The department also has rulemaking authority under this chapter, reflected in 50-9-110, MCA. According to 50-9-102(13), MCA, a qualified patient only includes an individual who has been determined to have a terminal condition. "Terminal condition" is further defined as:

"an incurable or irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of the attending physician or attending advanced practice registered nurse, result in death within a relatively short time."

50-9-102(16), MCA.

Whether an individual is a qualified patient is largely within the discretion of the provider. However, POLST is being adopted as the "living will protocol" under this statute, and the department is limited to the statutory definitions. It is not within the department's authority to adopt rules that would include individuals who do not meet the definition of "qualified patients". Any broader definition would require a statutory change. Individuals who do not qualify to use a POLST form because they do not fall within the definitions of the statute are still able to convey their wishes for end of life treatment with living wills.

COMMENT #2: ARM 37.10.101 appears to change the definition of "Comfort One" to address only those individuals who are terminally ill.

RESPONSE #2: The department disagrees. A careful review of the original definition of Comfort One reveals that it always applied to patients with a terminal illness. The definition previously read:

"Comfort one' means a comprehensive, statewide program of identifying, providing palliative care, and withholding resuscitative measures to terminally ill patients who have declared living wills or for whom a physician has issued a do-not-resuscitate order."

The words "who have declared living wills or" were removed to reflect that while the POLST form and protocol cover other end of life wishes, Comfort One is limited to patients with a DNR order. Comfort One was always directed at "terminally ill" patients as required by statute and explained in the department's response to comment #1.

COMMENT #3: The new language requires a physician to use the POLST form to issue a DNR order for a patient, and, in turn, limits the issuance of DNR orders to patients in a terminal condition.

RESPONSE #3: The department concurs. It was not the intent to limit a physician's ability to order a DNR to using the POLST form. In order to provide clarity, the department is removing (4) and changing the language as follows:

(2) When issuing a DNR order for a patient with a terminal condition, medical professionals are encouraged to use the POLST form and follow the DNR/POLST protocol approved by the Board of Medical Examiners and the department.

COMMENT #4: Concern was expressed that the POLST document obscures the right to refuse treatment by implying that a terminal illness is required.

RESPONSE #4: As noted in the department's response to comment #3, the language has been changed to allow physicians to issue DNR orders as before, indicating that POLST is the preferred method for an individual with a terminal

condition. While these rules are limited to qualified patients as defined in statute, individuals maintain the right to refuse treatment, and a provider is still able to issue DNR orders as before.

COMMENT #5: ARM 37.10.104(2)(a)(iii) is unnecessary and confusing.

RESPONSE #5: The department does not concur with this suggestion. It is necessary to allow physicians to issue DNR orders independently of POLST, as explained in the response to comment #3. While dealing with such written orders could be an additional challenge in the prehospital setting, eliminating (2)(a)(iii) would not allow emergency responders to act upon other written orders which will continue to be used in medical practice or to act upon verbal DNR orders if requested in a prehospital setting. The department feels that medical professionals will utilize POLST/Comfort One as much as possible and that use of written DNRs in the field setting will not occur in most instances.

COMMENT #6: The proposed language, "identifying the existence of a DNR order" in ARM 37.10.104(2)(b) is confusing.

RESPONSE #6: The department concurs. Under ARM 37.10.101(4), the definition clarifies that the Comfort One bracelet or necklace can only be issued to patients that have the current Comfort One form or have been identified as DNR patients on the POLST form. As such, under the context of ARM 37.10.104(2)(b), Comfort One bracelets and necklaces by definition identify that the patient has a DNR. The proposed language will be removed.

COMMENT #7: The term "physician" is used in ARM 37.10.104(2)(a)(iii), where in other places in the rules it has been replaced with "provider".

RESPONSE #7: The department concurs and will replace the word "physician" with the word "provider" in this subsection of the rule.

/s/ Shannon McDonald
Rule Reviewer

/s/ Russell E. Cater for
Joan Miles, Director
Public Health and Human Services

Certified to the Secretary of State October 27, 2008.